the only poster-maker known to have acted violently, and *no* violence followed ACLA's posters.

Even if there were a "pattern" between violence following the past publication of posters by non-parties, it could not convert petitioners' allegedly "similar" posters, which were *never* followed by violence, into "threats." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

III. THE PUNITIVE DAMAGES MUST BE STRICKEN

Contrary to respondents' contention, punishment of ACLA's speech with *any* amount of punitive damages under FACE – the first award of its kind in the country – is preeminently an issue calling for this Court's review.[9] *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (forbidding imposition of punitive damages for libelous speech on matters of public concern absent malice). In this case, public political speech was given less protection than libel.

Respondents do not dispute the point that petitioners can hardly be guilty of reprehensibility warranting punitive damages when a dozen circuit court judges split evenly on whether petitioners' speech is fully protected, and when *every* judge who reviewed this case found the communications at least substantially protected. Pet. 25-26. If the result here does not violate *State Farm*'s constitutionally mandated presumption *against* punitive damages, *State Farm v. Campbell*, 538 U.S. 408, 419 (2003), it is hard to imagine what result would.

IV. THE RICO AND FACE ISSUES LIKEWISE WARRANT REVIEW

A. The Ninth Circuit Was Bound To Follow *Scheidler*. Respondents argue that the fatal defect in

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[9] Despite respondents' quibbling, Resp. Br. 23 n.26, the punitive damages issue is "fairly included" within the First Amendment question, which treats the various punishments of ACLA's speech. S.Ct.R. 14.1(a).

their RICO claim was "waived." But ACLA could not have "waived" an error that was not an error at the time of trial (or even on the first appeal). Even the Ninth Circuit recognizes that a party "should not be penalized for failing to anticipate a change in the controlling law."[10] *Pierce Parking Co. v. John Morrell & Co.*, 633 F.2d 1362, 1365 (9th Cir. 1980).

As this Court held in *Johnson v. United States*, 520 U.S. 461, 468 (1991): "[W]here the law at the time of trial was settled and clearly contrary to the law at the time of appeal – it is enough that an error be 'plain' at the time of appellate consideration." Otherwise, counsel would be forced to make "a long and virtually useless laundry list of objections to rulings . . . plainly supported by existing precedent." *Id.*[11]

Nothing could be plainer after *Scheidler* than the legal nullity of respondents' extortion theory. Until *Scheidler*, all circuit courts, including the Ninth Circuit, held that Hobbs Act extortion did not require that the extortionist actually obtain property from the victim. *See Scheidler v. NOW*, 537 U.S. 393, 414-17 (2003) (Stevens, J., dissenting) (listing cases and acknowledging point).

Respondents' own opposing brief argues that *if they had known* their extortion theory was defective, they would have substituted "other predicate acts." Resp. Br. 27 n.31. In other words, respondents argue they should not be penalized for failing to anticipate the change in law, but *petitioners* should be. In any case, there are no other

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[10] Respondents' reliance on *Ackerman v. United States*, 340 U.S. 193, 198 (1950), is misplaced. Resp. Br. 25. *Ackerman* involved parties who declined to appeal and allowed the judgment to become final.

[11] Petitioners did not, as respondents suggest, raise the "obtaining" issue at the motion to dismiss stage in 1996 and then abandon it. Resp. Br. 25. The issue raised back then was whether the right to perform abortions was "property," not whether petitioners had to *obtain* that property. Pet. App. 383, 386-88.

predicate acts that could apply to petitioners.[12] *Scheidler*, 537 U.S. at 407.

Respondents further argue that the "law of the case" and the "rule of mandate" barred the Ninth Circuit from following *Scheidler*. Resp. Br. 24. That claim flies in the face of this Court's teaching that lower courts *must* apply an intervening Supreme Court decision *retroactively* "in all cases still open on direct review. . . . " *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 96 (1993); *see* LLDF Br. 3-5. Moreover, respondents ignore the long-settled rule that an intervening change of law is an exception to law of the case. *See* Pet. 17 & n.8. And, in any event, *this* Court is not bound by law of the case or by any lower court's mandate. *See Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 881 n.1 (1990); AFA Br. 5.

Finally, respondents do not dispute that RICO standing is a jurisdictional element *always* open to review. *Evans v. City of Chicago*, 434 F.3d 916, 924 (7th Cir. 2006).

B. Respondents Concede Lack Of Standing. Respondents do not deny that the two abortion clinics had no connection to any person named in ACLA's posters. Pet. 10-11, 28-29. Respondents merely assert that the jury mysteriously "found" that the clinics were somehow injured by communications that do not concern them. Resp. Br. 28.

Recognizing that Article III standing cannot be waived, respondents characterize this issue as one of statutory standing. Resp. Br. 28. Because the clinics

[12] In an amicus brief in *Scheidler*, respondents' *own* counsel argued that since "the federal circuit courts have *uniformly held*" that an extortionist need not obtain property from the victim, "[t]his Court should not declare [such a requirement] *to be the law*." *See* NOW Amicus Brief, Nos. 01-1118, 01-1119, at 12, 23. Yet respondents now offer the ludicrous argument that ACLA – but not respondents! – was on notice of what the law would be because the "obtaining" issue was "noted" during oral argument before this Court in 1993. Resp. Br. 25-26. What matters is not an issue "noted" thirteen years ago, but this Court's 2003 decision in *Scheidler*, which applies to this still pending case.

concededly lacked the minima for Article III standing, they *ipso facto* cannot reach the higher threshold of statutory standing. Pet. 29. In no event "may Congress abrogate the Art. III minima: A plaintiff must always have suffered a distinct and palpable injury to *himself*. . . . " *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979).

C. The "FACE Conspiracy" Is Fictitious. The fictitiousness of the FACE conspiracy claim is jurisdictional, not a mere failure to prove elements, as respondents contend. Resp. Br. 29. Respondents cite *Arbaugh v. Y & H Corp.*, 126 S.Ct. 1235 (2006), a case easily distinguished. There, this Court held that Title VII's application to firms with fifteen or more employees was not jurisdictional, but only a failure of plaintiff's proof that defendant had waived. *Id.* at 1238, 1245. Here, respondents did not merely fail to prove an element of "FACE conspiracy," but rather pursued a conspiracy claim *that does not exist* in federal law.[13]

CONCLUSION

The petition for a writ of certiorari should be granted.

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April 7, 2006

[13] It is irrelevant that ACLA proffered an alternative "FACE conspiracy" instruction. Resp. Br. 29. "[*N*]*o action of the parties* can confer subject-matter jurisdiction upon a federal court. Thus, consent of the parties is *irrelevant*." *Insurance Corp. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (also explaining that courts must dismiss whenever it appears there is no subject matter jurisdiction).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PLANNED PARENTHOOD OF THE COLUMBIA/ WILLAMETTE, Inc., et al., Plaintiffs-Appellees, v. AMERICAN COALITION OF LIFE ACTIVISTS, et al., Defendants-Appellants.	United States Court of Appeals Consolidated Docket No. 99-35320 (Docket Nos. 99-35320, 99-35325, 99-35327, 99-35331, 99-35333, 99-35405) On Appeal From United States District Court District of Oregon Honorable Robert E. Jones Docket No. 95-1671-REJ

PLAINTIFFS-APPELLEES' OPPOSITION TO DEFENDANTS-APPELLANTS' JOINT MOTION TO STAY THE MANDATE

* * *

1. The Supreme Court Is Not "Likely" To Grant Certiorari in This Case

Defendants-Appellants' assertion that the Supreme Court is "likely" to grant certiorari is both presumptuous and meritless. Indeed, the Supreme Court is *unlikely* to grant certiorari at this time – irrespective of the substantive merits of the issues raised in a petition – precisely because there is no final judgment in this case.

* * *

In its May 16, 2002 *en banc* Opinion in this case, this Court remanded the case to the District Court to consider the constitutionality of the punitive damages award. As a result, there is no final judgment in this case. The

Supreme Court has a long-standing policy against granting review until the courts below have rendered a final judgment.

* * *

The Supreme Court's practice of denying certiorari of non-final judgments is not a new development. The Supreme Court may deny certiorari at this time and, after the District Court and this Court decide the outstanding punitive damages question, Defendants-Appellants might seek Supreme Court review again. Thus, if this Court were to stay issuance of the mandate pending resolution of Defendants-Appellants' upcoming petition, and the Supreme Court were to deny certiorari; Defendants--Appellants would have guaranteed themselves a lengthy period of time between their two anticipated cert petitions (whatever the merits of any such petition). In other words, given the remand ordered by this Court, Defendants-Appellants' petition at this juncture will, in fact, delay the final resolution of the case, which compels this Court to deny the requested stay.

* * *

Dated: July 18, 2002

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PLANNED PARENTHOOD OF THE COLUMBIA/ WILLAMETTE, Inc., et al.,	United States Court of Appeals Docket No. 04-35214
Plaintiffs-Appellees, v. AMERICAN COALITION OF LIFE ACTIVISTS, et al., Defendants-Appellants.	On Appeal From United States District Court District of Oregon Honorable Robert E. Jones Docket No. 95-1671-JO

PLAINTIFFS-APPELLEES' OPPOSITION TO DEFENDANTS-APPELLANTS' JOINT MOTION TO STAY ISSUANCE OF THE MANDATE

* * *

B. No Good Cause Exists For A Stay

Even if this Court were to conclude that ACLA's upcoming certiorari petition might present a substantial question, ACLA's motion still should be denied because no good cause exists for a stay of the mandate. ACLA recognizes that "[t]he only issue on remand is whether plaintiffs will accept the remitted damages or want a retrial." (Motion ¶25, at 10.) Thus, all that remains in this litigation is for the district court to follow this Court's clear mandate as to the punitive damages amounts set by this Court.[3]

* * *

[3] Assuming, as Physicians do, that this litigation is over and this Court's September 6, 2005 Opinion stands, Physicians do not intend to ask the district court for a new trial.

Conclusion

For the reasons discussed above, Physicians respectfully request that ACLA's motion be denied and the mandate be issued.

Dated: November 4, 2005

Respectfully submitted,

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App. 6

No. 02-563

In the

Supreme Court of the United States

AMERICAN COALITION OF
LIFE ACTIVISTS, ET AL.,
Petitioners,

v.

PLANNED PARENTHOOD OF THE
COLUMBIA/WILLAMETTE, INC., ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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* * *

ACLA appealed. In an opinion by Judge Kozinski, a three-judge panel reversed, ruling that ACLA must threaten that it or its agents personally will commit the threatened violence.[9] The Ninth Circuit reheard the case *en banc*. In an opinion authored by Judge Rymer, joined by Chief Judge Schroeder and Judge Hawkins, Silverman, Wardlaw and Rawlinson, the *en banc* majority found that petitioners, with intention to intimidate, threatened violence, and affirmed the liability verdict and injunction, and remanded to the District Court for further proceedings on the amount of the punitive damages award.[10]

* * *

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[9] *See* note 33, *infra*.

[10] Those proceedings have not occurred and, thus, there is no final judgment in this case. *See Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 68 (1948) (holding that a judgment is not final "where liability has been determined and all that needs to be adjudicated is the amount of damages"). "[E]xcept in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). *See also Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R. Co*, 389 U.S. 327, 328 (1967).

(5)

Supreme Court, U.S.
FILED
MAR 27 2006
OFFICE OF THE CLERK

No. 05-1083

IN THE

Supreme Court of the United States

AMERICAN COALITION OF LIFE ACTIVISTS, ET AL.,

Petitioners,

v.

PLANNED PARENTHOOD OF THE COLUMBIA/WILLAMETTE, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS BRIEF OF THE AMERICAN FAMILY ASSOCIATION CENTER FOR LAW AND POLICY IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS[1]

The American Family Association Center for Law and Policy (AFA-CLP) is the legal arm of the American Family Association. AFA-CLP litigates vigorously in defense of the free speech rights of those who stand up for life and family. In particular, AFA-CLP attorneys have represented individuals sued under FACE and RICO, the two federal statutes underlying the lawsuit in the present case.

The case at bar involves precisely the attempt to use RICO and FACE to restrict anti-abortion speech. The AFA-CLP is concerned both with the misuse of RICO and FACE in this case and with the theory, endorsed by the Ninth Circuit, that posters and a website which identify and rebuke political opponents can support multi-million dollar damages liability and injunctive restraints.

The judgment below imposes liability for tactics -- publicly identifying and shaming others for their complicity in acts the speaker finds reprehensible -- which even the most strictly pacifist pro-lifer or, for that matter, member of some other movement, could, and should, be entitled to employ. The AFA-CLP therefore submits this amicus brief in support of petitioners.

This brief is being filed with the consent of the parties.

SUMMARY OF ARGUMENT

This is a textbook free speech case. The posters and website at issue identified physicians who do abortions, a tactic in the same tradition as the identification of boycott violators in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 903-04, 909-

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[1]No counsel for a party authored this brief in whole or in part. No person or entity aside from the AFA-CLP, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

The AFA-CLP is a division of the American Family Association (AFA). The AFA has no parent corporation and no stock.

10 (1982). The controversial nature of the speech makes the protections of the First Amendment especially important here. This Court should therefore grant review.

In the alternative, this Court should grant certiorari, summarily vacate the decision below, and remand for further consideration in light of *Scheidler v. NOW*, 537 U.S. 393 (2003), and *Virginia v. Black*, 538 U.S. 343 (2003), as both decisions bear directly upon the present case, but the Ninth Circuit has yet to address the impact of either decision on this case.

ARGUMENT

This is a classic, textbook free speech case. The provocative posters and website at issue fall into no recognized exception to the protections of the First Amendment. Respondents did not even contend that liability should rest on the claim that the speech in question constituted "fighting words" or unlawful incitement. While respondents did go to the jury on the claim that the speech was a "threat," *see* Pet. App. 416-18, 429, the en banc Ninth Circuit correctly acknowledged that the posters and website contained no threatening language. Pet. App. 73, 120. *See* Pet. App. 78-79 (recounting speech in question). The First Amendment therefore requires judgment for petitioners.

The Ninth Circuit, by a 6-5 vote, sought to evade this result by the unveiling of a new exception to the First Amendment: "format" liability. This unprecedented -- and theoretically unlimited -- exception strikes at the very heart of the First Amendment. This Court should grant review because of the grave importance of the questions presented.

I. THE FIRST AMENDMENT IS MOST NECESSARY WHEN THE SPEECH IS MOST CONTROVERSIAL.

Speech that is popular or pleasant has little need for constitutional protection. *City of Houston v. Hill*, 482 U.S. 451,

462 n.11 (1987). The true test of the right to free speech, under the First Amendment to the United States Constitution, is the strength of the protection that right affords to speech that is unpopular, unpleasant, disturbing, or even despised. *E.g., United States v. Eichman*, 496 U.S. 310 (1990) (flag burning).

Accordingly, this Court has insisted in case after case that the right to free speech embraces "vehement, caustic, and sometimes unpleasantly sharp attacks" upon the views or conduct of others, *New York Times, Co. v. Sullivan*, 376 U.S. 254, 270 (1964), and that the First Amendment protects even such "deeply offensive" speech as "virulent ethnic and religious epithets, *see Terminiello v. Chicago*, 337 U.S. 1 (1949), vulgar repudiations of the draft, *see Cohen v. California*, 403 U.S. 15 (1971), and scurrilous caricatures, *see Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988)." *Eichman*, 496 U.S. at 318-19. *Accord Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 774 (1994) ("insulting, and even outrageous, speech") (internal quotation marks and citations omitted).

The premise of the Ninth Circuit's holding is that petitioners should have known that the *format* of their two "GUILTY" posters would scare the respondents. But where the communication itself contains no threats, there is no "scary speech" exception to the First Amendment. If there were, the decisions in *Terminello* and numerous other precedents of this Court would have to be overruled. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam); *Watts v. United States*, 394 U.S. 705 (1969) (per curiam); *Hess v. Indiana*, 414 U.S. 105, 108-09 (1973) (per curiam); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971).

The Ninth Circuit's *ratio decidendi* is thus completely foreign to this Court's First Amendment jurisprudence.

This Court should grant review.

II. THIS CASE MERITS SUMMARY VACATUR AND REMAND FOR FURTHER CONSIDERATION IN LIGHT OF *SCHEIDLER v. NOW* AND *VIRGINIA v. BLACK*.

In the alternative, this Court should summarily vacate the judgment of the Ninth Circuit and remand for further consideration in light of *Scheidler v. NOW*, 537 U.S. 393 (2003), and *Virginia v. Black*, 538 U.S. 343 (2003).

Both decisions are directly applicable. The *Scheidler* decision rejects precisely the theory of Hobbs Act extortion, and thus RICO liability, upon which the respondents' RICO claim rests in this case.[2] And the *Black* decision not only is the most recent "threats" case from this Court, but more importantly clarifies that a "threat" entails an "expression of an intent *to commit* an act of unlawful violence," *Black*, 538 U.S. at 359 (emphasis added), not merely the exposure of someone, by publicly naming that person, to the risk that an *unconnected third party* might do

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[2]In the present case, respondents' theory of Hobbs Act "extortion" -- the sole predicate offense for the RICO claim, Pet. App. 422 -- suffers from the same defects as the Hobbs Act "extortion" claim this Court rejected in *Scheidler*. *See* Pet. App. 422-25. Namely, there was no requirement that the jury find the element of "obtaining of property." *See* Final Jury Instructions pp. 9 ("Plaintiffs claim that [the alleged threats were] made in an unlawful attempt to prevent the plaintiff from continuing to provide abortions"), 24 (RICO enterprise allegedly had "purpose . . . to drive [abortion providers] out of business"), 30 [Pet. App. 425] ("extortion" means threat designed "to deprive a plaintiff of his or her property"), 32 [Pet. App. 422-23] ("Property" includes "right to provide abortion services free from wrongful threats, violence, coercion, or fear" and "may also include money plaintiffs contend they were required to spend on security measures"), 33 [Pet. App. 423] (extortionate "intent" means "intent of depriving a plaintiff of his or her property or protected right to provide abortion services"), 34 [Pet. App. 423] ("deprive . . . of property or protected rights"), 35 [Pet. App. 424] (same).

harm.

Scheidler plainly requires reversal of the RICO portion of this case, leaving only the FACE claims. And *Black* requires reversal -- or at least warrants reconsideration of -- the "threat" theory underlying the FACE (and RICO) claims.

Remarkably, the Ninth Circuit refused even to consider the impact of *Scheidler* and *Black* in this case. Invoking the doctrine of "law of the case," Pet. App. 32-34, the Ninth Circuit held that it "could not go there," Pet. App. 32.

Supervening Supreme Court decisions are, of course, one of the standard *exceptions* to the law of the case. *See* 3-30 Moore's Manual Fed. Practice and Procedure, Sec. 30.31(1)(b). The decision below is thus plainly erroneous on its own terms.

But even more to the point, *this Court* is not bound by a lower court's mandate or law of the case. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 881 n.1 (1990) (though court of appeals had invoked the law of the case, "the earlier panel's ruling does not, of course, bind this Court"); *Christiansen v. Colt Industries Operating Corp.*, 486 U.S. 800, 817 (1988) ("a court of appeals' adherence to the law of the case cannot insulate an issue from this Court's review"); *Messenger v. Anderson*, 225 U.S. 436, 444 (1912) (regarding law of the case in lower court, "[o]f course this court, at least, is free when the case comes here").

Hence, this Court undisputably may direct the Ninth Circuit to consider the impact of *Scheidler* and *Black* on the present case. Given that such further consideration might go a long way to sharpening, or even eliminating, the issues presented here, this Court ought strongly to consider this simple option.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

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